No. 87-636

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

EFTHIMIOS A. KARAHALIOS,
Petitioner,
v.
DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether an employee of the federal government has a private right of action in federal district court to claim that his union has violated its statutorily prescribed duty of fair representation, or whether he must seek redress through the administrative procedure provided by the statute.

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INTEREST OF THE AMICUS

Amicus, National Treasury Employees Union (NTEU), is a federal sector labor organization that is the exclusive bargaining representative of over 140,000 federal employees nationwide. NTEU represents the interests of members of its bargaining units by, *inter alia*, negotiating collective bargaining agreements with agency employers and by arbitrating grievances under the agreements. In addition, NTEU frequently conducts litigation on behalf of the employees it represents, seeking to vindicate their statutory and constitutional rights, before both administrative and judicial tribunals.

This case concerns the construction of Title VII of the Civil Service Reform Act of 1978. Pub. L. No. 95-454, 92 Stat. 1111, *et seq.* (CSRA). The specific issue before

the Court is whether that Act confers upon federal employees a direct judicial cause of action to remedy violations by federal sector unions of the statutorily created duty of fair representation. NTEU has a vital interest in the Court's resolution of this issue, both because of its status as a federal sector labor union, and because of its general commitment to ensuring that federal employees enjoy access to the federal courts to vindicate their statutory and other rights, where appropriate. Because this Court's decision will necessarily address the question whether unions like NTEU are subject to suit in district court when a violation of the duty of fair representation is claimed, and because resolution of this narrow issue may involve consideration of the extent to which Title VII limits employees' access to the federal courts generally, NTEU submits this brief to assist the Court in its review of this case.[1]

STATEMENT

1. This case arose out of a claim by Efthimios Karahalios that his union, the National Federation of Federal Employees, Local 1263 (NFFE), improperly refused to arbitrate a grievance he had filed against his employer, the Defense Language Institute (DLI). Pet. App. 4a. The underlying grievance involved a promotion to a newly created position, which DLI gave Mr. Karahalios in early 1977, and which it cancelled in May, 1978. J.A. 82, 85. DLI cancelled the promotion after another employee, Simon Kuntulos, filed a grievance which successfully challenged the procedures used to promote Karahalios, and then gained the position when the Agency reopened the decision. Pet. App. 3a-4a. As the court of appeals noted, however, Kuntulos success was "short

[1] Pursuant to Rule 36 of the Rules of this Court, all current parties have consented to the filing of this brief. Their letters of consent are lodged with the Court.

lived," as his new position was abolished 18 months later in October, 1979. Pet. App. 4a.

After DLI gave Kuntulos the position, Karahalios himself filed a grievance against DLI, challenging the procedures DLI used in selecting Kuntulos. J.A. 85. NFFE processed the grievance. The union, however, refused to take the grievance to arbitration on the advice of counsel that this would constitute a "conflict of interest" with the union's earlier representation of Kuntulos. J.A. 86.

In May, 1979, Karahalios filed unfair labor practice charges against DLI and NFFE with the Federal Labor Relations Authority (FLRA). J.A. 50. The FLRA's General Counsel ordered that a complaint be issued against NFFE in June, 1980, alleging that the union had violated its statutorily imposed duty of fair representation (DFR). 5 U.S.C. §§ 7114(a)(1), 7116(b)(8). Shortly thereafter, the FLRA Regional Director and NFFE settled the complaint. J.A. 87. In the settlement agreement, NFFE agreed to notify all members of its bargaining unit that it would not inform employees that it could only represent one employee where two or more employees are seeking one position. J.A. 87-88. The settlement did not provide any individual relief for Karahalios.

2. In October, 1981, two years after the position he sought had been abolished, Karahalios brought this action in district court against both DLI and NFFE, alleging violations of law, regulation and the Constitution. J.A. 4-14. NFFE filed a motion to dismiss the action on the grounds that the district court lacked jurisdiction over Karahalios' duty of fair representation suit. It argued that Title VII of the Civil Service Reform Act of 1978, which expressly creates the duty of fair representation in the federal sector, also provides the exclusive remedy for its violation—namely, pursuit of a complaint through the Federal Labor Relations Authority, with judicial review in the courts of appeals. J.A. 55.

The district court denied NFFE's motion to dismiss. J.A. 58.[2] After a June, 1984 trial, the court issued an opinion on the merits holding that NFFE had breached its duty of fair representation to Karahalios by not considering his interests when it represented Kuntelos, by not notifying him of the Kuntelos arbitration, and by not taking his grievance to arbitration. J.A. 89-92. The Court, however, refused to award Karahalios any individual relief (except attorney fees), because it found that the two employees vying for the promotion "were simply too evenly matched" for the court to determine that Karahalios would have been successful in gaining the promotion had the union invoked arbitration on his behalf. J.A. 95.

3. The court of appeals reversed. Pet. App. 3a. It held that the district court lacked jurisdiction over Karahalios' claims against the Union. The court noted that in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), this Court had ruled that a private sector employee may sue directly in federal district court to enforce the union's duty of fair representation. Pet. App. 7a. However, it concluded that Congress deliberately decided not to apply that rule in the federal sector, when it enacted Title VII of the CSRA and instead decided to treat violations of the duty of fair representation as unfair labor practices that must be decided by the Federal Labor Relations Authority in the first instance, with subsequent review in the courts of appeals. Pet. App. 7a.

The court of appeals observed that Congress' decision not to allow district court review of arbitration matters, but instead to vest review authority in the FLRA, indicated a departure from the scheme of the National Labor Relations Act. 29 U.S.C. §§ 185, 187 (NLRA); Pet. App. 8a-10a. The court also noted that Congress had expressly

[2] The court held, however, that it lacked jurisdiction over Karahalios' contract claims against DLI and eventually granted summary judgment in favor of the agency. J.A. 62, 68, 81.

included the duty of fair representation in the CSRA, and provided a remedy for its violation. Pet. App. 11a. Thus, the court explained, there is a "fit between the duty and the remedy provided." Pet. App. 10a-11a. It concluded that Congress intended to channel duty of fair representation claims in the federal sector through the FLRA.[3]

In light of the conflict in the circuits concerning this issue, on June 6, 1988, this Court granted petitioner's request for a writ of certiorari.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that federal employees' statutory rights to receive fair representation by their unions is properly considered through administrative procedures before the Federal Labor Relations Authority and not in district court. The issue presented here is a narrow one. Contrary to petitioner's insistence, this case does not require the Court to determine whether, in the face of Congressional silence, it is fair to assume that Congress intended to "extinguish" a preexisting judicial cause of action to remedy violations of the duty of fair representation. Pet. Br. at 24. As we show, *infra*, before 1978, federal employees did not possess a judicial cause of action to remedy violations of the duty of fair representation. In fact, decisions concerning violations of this duty were vested exclusively in the Assistant Secretary of Labor and the Federal Labor

[3] Rejecting Karahalios' arguments to the contrary, the court found "insufficient evidence that the FLRA does an inadequate job in protecting the rights of the individual worker in relation to a federal union." Pet. App. 12a. In this particular case, "the FLRA preferred a settlement with implications for all employees in the future to making Karahalios whole." However, as this case demonstrated, "the existence of a district court remedy after investigation and issuance of a complaint by the General Counsel may lead to a tortuous path of litigation whose costs are disproportionate to the individual benefit achieved." Pet. App. 12a-13a.

Relations Council, with no opportunity at all for judicial review.

In this case, then, the question is whether Congress intended to create a private cause of action in 1978 that did not exist before it enacted the CSRA. We submit that it is clear that Congress did not intend to permit federal employees to sue federal sector unions in district court to remedy violations of the duty of fair representation. The language of the CSRA, its structure, and its legislative history all demonstrate that when it expressly included the duty of fair representation in the federal sector labor relations statute, Congress clearly intended to continue to have duty of fair representation claims adjudicated administratively by the FLRA, the administrative body created by the CSRA to handle all labor relations questions in the federal sector. Congress provided virtually no role for the district courts in this scheme. Indeed, the legislative history shows that Congress deliberately decided to limit the role of the district courts in matters arising under the federal labor statute.

Petitioner bases his argument that federal employees should, nonetheless, be permitted to pursue DFR suits in federal court entirely upon analogy to the private sector rule, as set forth in *Vaca* v. *Sipes*, 366 U.S. 171 (1967). We agree with petitioner that the private sector law is generally a good model for interpreting the federal sector labor statute. However, in this case there are strong reasons for rejecting the private sector rule.

First, and most obviously, the federal sector statute, unlike the NLRA, explicitly confers upon employees the right to fair representation by the union, and, it is undisputed that the very same statute creates a specific administrative remedy for its violation. In the private sector, the right to fair representation was implied by the Court, and it was only much later, after this Court had recognized the right, that the NLRB concluded that it

had jurisdiction to remedy violations of the duty of fair representation. In the face of that tardy recognition of the duty, this Court, in *Vaca*, refused to divest employees of their right to proceed directly in district court, a right that had been recognized for more than twenty years.

Moreover, the considerations that impelled this Court to acknowledge the continuing vitality of the employee's private right of action in *Vaca* are not present in the federal sector. The *Vaca* Court was concerned that depriving employees of access to district court could lead to conflicting rules of substantive law; further the Court did not view the National Labor Relations Board (NLRB) as a body that had particular expertise in matters arising under the duty of fair representation. Thus, the reasons usually favoring preemption of court jurisdiction by the NLRB were absent in *Vaca*.

In the federal sector, however, the FLRA, unlike the NLRB in the private sector, has within its jurisdiction not only unfair labor practices, but also "review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery." *Vaca*, 387 U.S. at 181. The FLRA decides negotiability disputes and also has exclusive jurisdiction to review arbitration decisions. It therefore is responsible for many of the matters that the district courts have authority over in the private sector under Section 301. Permitting federal employees to nonetheless pursue DFR complaints in district court would frustrate Congressional intent to channel such issues to the FLRA, the administrative body with the relevant expertise. Moreover, it presents the specter of establishing "conflicting rules of substantive law" between the courts and administrative agencies that was not present in *Vaca*.

Finally, the "unique interests" served by the duty of fair representation—to protect employees for whom union

representation has taken the place of individual forms of redress—are far less important in the federal sector, than in the private. The rights of federal employees in relation to their government employer have never been based upon contract, but rather upon statutes and regulations. The rights granted by the CSRA to organize and bargain collectively supplement, but in many respects do not replace these statutory rights. Indeed, the CSRA preserves the rights of individual employees to pursue their own separate statutory appeals for the most severe employment actions.

ARGUMENT

I. CONGRESS DID NOT INTEND THAT FEDERAL EMPLOYEES ENFORCE THEIR RIGHT TO FAIR REPRESENTATION THROUGH THE DISTRICT COURTS AND THIS COURT SHOULD, THEREFORE, NOT IMPLY SUCH A RIGHT OF ACTION.

A federal union's duty to fairly represent employees is specifically provided for in the CSRA. Section 7114(a)(1) states:

> An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to union membership.

5 U.S.C. § 7114(a)(1). This duty, and other agency and union responsibilities under the labor relations title are enforced by the FLRA, through its unfair labor practice (ULP) jurisdiction. 5 U.S.C. §§ 7105(a)(2)(G), 7118, 7116. In addition to listing specific employer and union acts which are prohibited, Section 7116 also provides that it is an unfair labor practice for a labor organization "to otherwise fail or refuse to comply with any provision of this chapter." 5 U.S.C. § 7116(b)(8). Thus, the statute provides a right and a remedy and the FLRA has, since its inception, used its unfair labor practice jurisdiction to adjudicate charges that unions have violated the duty

of fair representation. *See National Treasury Employees Union v. Federal Labor Relations Authority*, 721 F.2d 1402, 1404-1405 (D.C. Cir. 1983); *Federal Aviation Science and Technological Association, NAGE and Spargo*, 2 FLRA 802 (1980); *American Federation of Government Employees, Local 987 and Bradley*, 3 FLRA 715 (1980).

On the other hand, the CSRA nowhere provides a direct judicial mechanism for employees, unions, or employing agencies to enforce their rights under the labor relations chapter, and there is nothing in the specific language Congress used which indicates an intent to create a judicial cause of action. The issue in this case is whether this Court should nonetheless imply that a private right of action exists, even though Congress has not explicitly provided one.

The general principles which this Court applies in evaluating proposed rights of action that are not specifically provided by statute have been repeated often and recently reaffirmed. The question to be answered is "whether Congress intended to create the private remedy asserted" and the task is "basically a matter of statutory construction." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 16 (1979). The inquiry begins with the language of the statute itself, which may implicitly contemplate or foreclose a remedy. *Transamerica Mortgage Advisors, supra*, 444 U.S. at 18; *Touche, Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Congress' intent may also be determined by examining the context of the law at the time that the legislation was enacted, to determine the legislature's perception of the law it was shaping or reshaping. *Thompson v. Thompson*, —— U.S. ——, 108 S.Ct. 513, 516 (1988); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378 (1982). Finally, where the statute grants a particular remedy, which is part of a carefully crafted enforcement scheme, the Court is reluctant to create additional rem-

edies. *Transamerica Mortgage Advisors, supra,* 444 U.S. at 19; *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134 (1985). Each of these basic principles points to rejecting the implied cause of action which the petitioner has asked the Court to establish.

At the outset, it is clear that, as we have noted, the statutory language does not contemplate a private right of action to enforce the statutory duty of fair representation. The law simply requires the union to be "responsible for representing the interests of all employees in the [bargaining] unit" and a law like this which simply "proscribes certain conduct, and does not in terms create or alter any civil liabilities" will not generally be seen as also creating a judicial remedy, especially where "the statute expressly provides a particular remedy or remedies." *Transamerica Mortgage Advisors, supra,* 444 U.S. at 19-20.

Indeed, the overall structure of the statute also plainly evidences Congress' preference that pure labor relations questions be settled in the first instance by the FLRA, with review in the courts of appeals, and never in the district courts. Under the statute, the FLRA has the authority to decide unfair labor practices, to resolve negotiability disputes, and to determine exceptions from arbitrators' awards. 5 U.S.C. §§ 7105(a)(2)(E), (G), (H). Judicial review of FLRA decisions is accomplished, if at all, in the courts of appeals. *See* 5 U.S.C. § 7123. The only statutory role for district courts is to grant temporary relief from an unfair labor practice upon the petition of the FLRA's General Counsel. 5 U.S.C. § 7123(d).

In the face of the specific language of the statute, and its structure, which create both a right and an explicit administrative remedy, petitioner argues nonetheless that Congress contemplated that employees would also enjoy an additional remedy never mentioned in the statute—the

right to sue directly in district court. The legislative history of the CSRA, however, considered in light of the context in which it was enacted, plainly refutes that contention.

Title VII of the CSRA was part of the "comprehensive revision" of the civil service laws Congress undertook in 1978 and it is "the first statutory scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority,* 464 U.S. 89, 91 (1983). While the CSRA contains the first codification of the federal labor relations scheme, Congress was by no means writing on a blank slate in 1978. From 1962 to 1978, labor relations in the federal government was conducted pursuant to Executive Order.[4]

The Executive Order scheme contained many features traditionally associated with collective bargaining in the private sector, such as exclusive representation by unions and proscribed unfair labor practices. Exec. Order 11491, §§ 7, 19, *Legislative History* at 1344, 1347. However, it also had distinctive components, such as its two management controlled administrative review bodies. The Assistant Secretary of Labor for Labor-Management Relations decided unfair labor practice charges. *Id.,* § 6. His decisions were subject to limited review by the Federal Labor Relations Council (FLRC), a review body composed of three executive branch management officials. *Id.,* § 4; *see In re National Association of Government*

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[4] *See* Exec. Order No. 10988, 3 C.F.R. 521 (1962) (January 17, 1962); Exec. Order No. 11491, 3 C.F.R. 861 (1966), as amended by Exec. Order No. 11616, 11636 and 11838; 3 C.F.R. §§ 605, 634, 957 *reprinted in* 5 U.S.C.A. § 7101 (historical note). The Executive Orders are reprinted in the bound legislative history of Title VII of the CSRA. Subcommittee on Postal Personnel and Modernization, House Committee on Post Office and Civil Service, *Legislative History of the Federal Service Labor Management Relations Statute, Title VII of the Civil Service Reform Act of 1978,* 96th Cong., 1st Sess., Comm. Print No. 96-7 (hereafter cited as *Legislative History*).

Employees, 5 FLRC 157 (1977). The FLRC also determined whether particular subjects were within the duty to collectively bargain, termed "negotiability determinations," and reviewed arbitration awards by way of "exceptions". *Id.* §§ 4(c)(2), (3).[5] The decisions of the Counsel were not subject to judicial review. *Bureau of Alcohol, Tobacco & Firearms*, *supra*, 464 U.S. at 92.

There are two elements of the Executive Order scheme which are of particular significance to the issue presented here. First, the Executive Order contained a virtually identical requirement that labor organizations fairly represent all employees in the bargaining unit.[6] This provision was interpreted to create a similar substantive duty of fair representation in the federal sector as the courts had developed over the years in the private sector. *See Local R7-51, National Association of Government Employees and Charles A. Quilico*, 7 A/SLMR 775 (1977); *National Association of Government Employees, Local R14-32*; 4 A/SLMR 849 (1974); *American Federation of Government Employees, Local 2028 and Arthur Williams*, 4 A/SLMR 586 (1974).

Second, before the CSRA was enacted, the judicial role in enforcing the duty of fair representation in the federal sector was vastly different than its role in the private sector. In fact, the judiciary had no role at all before

[5] These concepts along with many other distinctive features of the Executive Order scheme have been incorporated into the CSRA. *See* 5 U.S.C. § 7117(c), 7122.

[6] Section 10(e) provided that:

> When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. Exec. Order 11491, § 10(e) *Legislative History* at 1345; *compare* 5 U.S.C. § 7114(a).

1978 in federal sector labor relations. As we have noted, *supra* at 12, decisions of the FLRC were not subject to judicial review. In addition, the courts rejected employee attempts to directly enforce obligations granted under the Executive Order in court, both because the Order was not promulgated pursuant to statutory authorization, and because the Order "does not contemplate a private civil action in the federal courts to enforce its terms," either "express" or "implied." *Local 1498, American Federation of Government Employees v. American Federation of Government Employees*, 522 F.2d 486, 492 (3d Cir. 1975).[7]

Thus, when Congress set about to revise and codify the federal labor relations scheme, it started from a model which contained the employee right at issue here, and virtually no judicial remedy for enforcing this, or any other employee rights. Under the CSRA, Congress streamlined the administrative processing of complaints concerning violations of the labor statute. Both the House and Senate versions of the reform bill called for the creation of an independent FLRA, and the Senate Committee explained that this new entity was necessary to eliminate "what is perceived by Federal Employee unions and others as a conflict of interest in the Council" and to eliminate the existing "fragmentation of authority" between the Council and the Assistant Secretary. S. Rep. 95-969, 95th Cong., 2d Sess. 7-8; *Legislative History* at 747-48. The FLRA assumed the unfair labor practice jurisdiction of the Assistant Secretary, similar to the jurisdiction of the NLRB. In addition, the FLRA assumed the Council's jurisdiction over "negotiability" disputes and "exceptions" to arbitration awards. 5 U.S.C. § 7105(a); *see Bureau of Alcohol, Tobacco & Firearms*, *supra*, 464 U.S. at 92-93. In many respects the latter portion of the

[7] *See also, Stevens v. Carey*, 483 F.2d 188, 190-91 (7th Cir. 1973); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965).

FLRA's jurisdiction is analogous to the role the district courts play under Section 301 of the Labor Management Relations Act (LMRA). 29 U.S.C. § 185; *See* 5 U.S.C. § 7122(a)(2) (FLRA to review arbitrations on grounds similar to federal courts).

In addition to streamlining the administrative process when it enacted the CSRA, Congress also carefully extended the role of the courts in federal sector labor relations matters. However, the legislative debate surrounding the judicial review provisions demonstrates that the explicit provisions that came out of the Congress were the product of extensive compromise. That legislative history is simply inconsistent with petitioner's assertion that Congress intended to permit federal employees, for the first time, to sue their unions in federal court to vindicate the statutory duty of fair representation.

In contrast to the Congressional consensus on the need for an independent FLRA, the House and Senate bills differed markedly on the role of the judiciary. The Carter Administration's version of CSRA, which was introduced in the Senate and reported by the Committee on Governmental Affairs, provided for no judicial review whatsoever of FLRA decisions. S 2640, 95th Cong., 2d Sess., § 7146(k), *as reported* § 7204(1), *Legislative History* at 458, 513. On the floor of the Senate, S 2640 was amended to allow judicial review of unfair labor practice decisions of the FLRA. 124 Cong. Rec. 514321-22 (daily ed. Aug. 24, 1978). *Legislative History* at 1036-38.[8] The Senate bill provided no role for the district courts, other than a role in the enforcement of FLRA subpoenas. *Id.* § 7179(b), *Legislative History* at 485.

[8] The amendment was proposed by Senator Stevens who argued that judicial review would be available of decisions of the new Merit Systems Protection Board, that unfair labor practice complaints can be just "as serious" as adverse actions, and that judicial review of National Labor Relations Board unfair labor practice decisions is permitted. *Id.*

The House version of the reform bill departed from the administration proposal, and provided for a broader judicial role in the labor relations process. It permitted broad judicial review of FLRA decisions, including decisions on arbitration exceptions. H.R. 11280, 95th Cong., 2d Sess., § 7123, *Legislative History* at 979. In addition, the House bill allowed "any party to a collective bargaining agreement" to directly petition a district court to compel arbitration. *Id.* § 7121(c), *Legislative History* at 978. Taken together, these two provisions would have given the federal courts a significant role in both the enforcement and interpretation of federal sector collective bargaining agreements and the grievance and arbitration procedures they are required to contain. The House bill would have given the district courts a role in federal sector labor relations analogous to the role that they have in the private sector.

In conference, the House and the Senate compromised, with the result closer to the Senate's more limited role for the courts. The conference determined that all FLRA decisions would be reviewable in the courts of appeals, except decisions on arbitration exceptions and appropriate units, which would not be reviewable at all. H. Rep. 95-1717, 95th Cong., 2d Sess. 153, *Legislative History* at 821. The apportioning of unreviewable authority to the FLRA over arbitration matters was enhanced by deleting the House provision allowing parties to petition the district court to compel arbitration. *Id.* at 157, *Legislative History* at 825.

Thus, in its final deliberations, Congress rejected giving the district courts in the federal sector any authority over collective bargaining and arbitration, let alone the authority they possess in the private sector under Section 301. The courts of appeals were granted a definite oversight role in the statutory scheme, but Congress also deliberately rejected a general role for the district court in the day-to-day operation of the federal labor scheme. In-

stead, it granted this role to the FLRA. All challenges to arbitral decisions involving pure grievances must go to the FLRA.[9] Further, the FLRA's decisions reviewing arbitral awards are not subject to judicial review, unless an unfair labor practice is involved. 5 U.S.C. § 7123 (a)(1).

The continuity between the Executive Order and the CSRA is particularly useful in understanding why, as petitioner emphasizes, "there was *no* Congressional discussion of federal court jurisdiction over duty of fair representation cases when the CSRA was passed." Pet. Br. 23 (original emphasis). Petitioner asserts that this silence indicates Congress' intent to incorporate, without modification, the entire private sector remedial scheme for duty of fair representation violations. Pet. Br. at 24. The more reasonable conclusion, however, is that Congress simply intended that the union's duty would continue to be a part of the integrated administrative scheme, as it was before 1978. Certainly, had Congress intended to separate out DFR cases from its new integrated scheme, its intent to do so would have been manifest.

Thus, under the CSRA we have a situation where Congress, in the same statute, specifically identified the union's duty to fairly represent employees, granted the employee an administrative avenue to seek the vindication of that right through the unfair labor practice procedure, and then carefully provided for appellate review of certain agency determinations and arbitration awards, but virtually no direct involvement of the district courts. Given this clear pattern of careful allocation of rights and remedies, it is inconceivable that "Congress absentmind-

[9] Grievances which involve matters which could be appealed to Merit Systems Protection Board may be appealed to the United States Court of Appeals for the Federal Circuit and grievances involving discrimination may be reviewed by the Equal Employment Opportunity Commission. 5 U.S.C. §§ 7121(d), (f).

edly forgot to mention an intended private action." *Transamerica Mortgage Advisors, supra*, 444 U.S. at 20. Rather, it appears that Congress intended to create certain defined judicial remedies concerning a subject over which few, if any, had existed in the past, and that no jusitfication exists for supposing Congress intended that duty of fair representation claims could be brought directly into court.

II. THE REASONS UNDERLYING RECOGNITION OF A JUDICIAL RIGHT OF ACTION FOR PRIVATE SECTOR DUTY OF FAIR REPRESENTATION CLAIMS DO NOT APPLY TO THE FEDERAL SECTOR.

A. Introduction

The petitioner asserts that, because Congress utilized a labor relations scheme for federal employees that is, in many ways, patterned on the NLRA, that the Court should likewise recognize a district court remedy for duty of fair representation violations under the CSRA. We agree with the petitioner's observation that the federal sector labor statute is modeled upon the NLRA and that it is appropriate to look to the private sector case law to interpret the obligations the CSRA imposes. *See National Treasury Employees Union v. Federal Labor Relations Authority*, 800 F.2d 1165, 1168-69 (D.C. Cir. 1986); *Library of Congress v. Federal Labor Relations Authority*, 699 F.2d 1280, 1286-87 (D.C. Cir. 1983). However, to cite that general rule does little to advance the analysis here. In this case, the differences between the procedural frameworks each statute creates render reliance upon the private sector case law inappropriate.

We have already examined in detail one significant difference between the NLRA and the CSRA; the CSRA contains a statutory recognition of the union's duty of fair representation and an express administrative remedy for the employee, a combination that argues against the creation of a parallel judicial cause of action. *Supra*

at 10. The defects in petitioner's argument are not, however, limited to its inconsistency with the structure and history of the CSRA. In addition, this Court's rationale for permitting a judicial remedy under the NLRA, as explained in *Vaca v. Sipes*, 386 U.S. 171 (1967), simply does not apply to the federal labor scheme.

In *Vaca*, the Court confronted the claimed "preemption" of the duty of fair representation cause of action that it had developed over the course of more than twenty years. *Id.; see Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). In brief, the NLRB had, in 1962, come to the still controversial conclusion that a union's breach of the duty of fair representation violates Section 8(b) of the NLRA. 29 U.S.C. § 158(b); *Miranda Fuel Co.*, 140 NLRB 181 (1962). The Court explained that the preemption doctrine, which forecloses federal court jurisdiction over claims which are "arguably" unfair labor practices, would not be "rigidly applied where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca, supra*, 386 U.S. at 179. Without determining whether the NLRB's position in *Miranda Fuel* was correct, the Court refused to cut off the long recognized right of an employee to enforce this duty in the district courts. The reasons the Court gave, however, counsel against such a remedy under the scheme Congress has created in the federal sector.

B. The Federal Labor Relations Authority, Unlike the National Labor Relations Board, Has Extra Expertise that Makes It the Logical Forum for Resolving DFR Complaints

In *Vaca*, this Court observed that "[a] primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the agency created by Congress for that purpose—is not applicable to cases involving breaches of

the union's duty of fair representation." *Id.* 386 U.S. at 180-181. The Court held that the "need to avoid conflicting rules of substantive law" between the courts and administrative agencies did not apply to the duty of fair representation, because the doctrine had been judicially developed and because "review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery" are "not normally within the Board's unfair labor practice jurisdiction." *Id.* at 181.

In the federal sector, however, exactly the opposite is true. The FLRA's statutory jurisdiction extends not only to the duty of fair representation itself, *see supra* at 8, but to the negotiation positions of the parties and to arbitration matters. *Supra* at 13. Thus, while the FLRA has unfair labor practice jurisdiction patterned after the NLRB, Pet. Br. at 20, it also has a unique, expedited negotiability jurisdiction through which unions present a request directly to the FLRA asking it to "clarify the scope of the agency's duty to bargain." *Federal Labor Relations Authority v. Aberdeen Proving Ground*, —— U.S. ——, 108 S.Ct. 1261, 1263 (1988); 5 U.S.C. § 7117. And, with a few exceptions, the FLRA is the appellate body which reviews arbitration awards, and it thus has an intimate, and unreviewable relationship to the "grievance machinery." 5 U.S.C. §§ 7121, 7123. In short, under the CSRA, it was intended that the FLRA would develop the expertise that the NLRB was said to lack in *Vaca*.

These differences in structure and function are absolutely critical. The determination of whether a remedy granted under one federal labor statute is available under another is not governed by the similarity of the substantive right that is at issue, but by the remedial structure of the two laws. *Communications Workers of America v. Beck*, —— U.S. ——, 108 S.Ct. 2641, 2647

(1988).[10] *Vaca* is grounded on the fact that the type of dispute at issue, involving collective bargaining positions and grievance procedures, is the same type of dispute that the courts would address under Section 301. 29 U.S.C. § 185, *Vaca*, *supra* at 181. As we have seen, however, Congress explicitly rejected this role for the district courts in the federal labor scheme, when it rejected the House bill's provision for district court involvement in arbitration and decided that all arbitration issues would be "considered at least in the first instance by the Authority." H. Rep. 95-1717, *supra*, *Legislative History* at 157.

Were this Court to nonetheless recognize a private right of action under the CSRA, it would create a mirror image of the improper split the Court found would exist in *Vaca*, if a private right of action were *not* recognized under the NLRA. That is, if petitioner's position were adopted, the district courts, which have no role in deciding collective bargaining issues or in the handling of the grievance machinery, would be put in the business of deciding whether unions had violated their duty of fair representation in discharging their responsibilities.

The petitioner misses the point when he argues that the lack of a "Section 301 analogue" in the federal sector is irrelevant to determining the applicability of *Vaca*, because Section 301 is not the basis of federal court jurisdiction over the duty of fair representation. Pet. Br. 26-30. Section 301 is relevant not because it provides the

[10] In *Beck*, the Court explained that it did not have jurisdiction over a violation of Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3), even though it would have jurisdiction over an identical section of the Railway Labor Act, 45 U.S.C. § 152. It is the RLA's lack of an administrative scheme to enforce the rights at issue that created the distinction. The Court went on to hold that it could consider the same issue under the NLRA, however, because it was necessary to decide an independent duty of fair representation claim. *Id.*

basis for the district court's jurisdiction over these claims, (it does not) but because it provides the district courts with the "expertise" that makes them the logical forum to resolve these disputes in the private sector. *Vaca*, *supra* at 181. In the federal sector, it is the FLRA that has the opportunity to develop expertise over collective bargaining, and Congress rejected even a minimal role for the courts in that area.

Indeed, the FLRA has shown no hesitancy in asserting its jurisdiction over allegations that unions have breached the duty of fair representation and has been developing its expertise over this subject since its creation. *See Federal Aviation Science and Technological Association Division, NAGE, and Spargo*, 2 FLRA 802 (1980); *American Federation of Government Employees, Local 987 and Bradley*, 3 FLRA 715 (1980); *National Federation of Federal Employees, Local 1453 and Crawford*, 23 FLRA 686 (1986).[11] In fact, the Courts of Appeal have, on occasion, curbed FLRA efforts to extend the duty of fair representation beyond the collective bargaining arena. *See American Federation of Government Employees v. Federal Labor Relations Authority*, 812 F.2d 1326 (10th Cir. 1987); *National Treasury Employees Union v. Federal Labor Relations Authority*, 800 F.2d 1165 (D.C. Cir. 1986).

While there have been some critics who have claimed that the FLRA has not been sufficiently vigorous in enforcing the duty of fair representation, *see* Pet. App. 11a, cases such as the present one demonstrate that the

[11] The Carter Administration anticipated the passage of the CSRA and created the FLRA in May 1978 in "Reorganization Plan No. 2 of 1978." *Legislative History* at 630; *see* 5 U.S.C. § 901, *et seq.* Even during the period prior to the effective date of the CSRA, the FLRA issued unfair labor practice complaints alleging violations of the duty of fair representation pursuant to Executive Order 11491. *See National Treasury Employees Union v. Federal Labor Relations Authority*, 721 F.2d 1402, 1404 (D.C. Cir. 1983).

FLRA's judgment can be trusted. Far from "falling through the cracks," as the Petitioner claims, Pet. Br. at 38, Karahalios got *exactly* the same result from the FLRA that he got from the District Court. He won a declaration that the union had violated his rights, and *no* compensatory damages, because there is no proof that the union's purported breach actually injured him. J.A. 95. The FLRA cannot be faulted for its resolution of this case and petitioner has not demonstrated that it acted improperly here.[12]

C. In the Federal Sector it is "Practical" to Vest the Federal Labor Relations Authority With Exclusive Jurisdiction Over DFR Cases

The lack of a federal sector analog to Section 301, and the corresponding lack of a role for the district court in federal collective bargaining matters, undercuts another of the reasons the Court cited in *Vaca* to justify district court involvement in duty of fair representation cases in the private sector. There is no "intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts" here, and thus no "practical considerations" favoring district court review. *Vaca, supra* at 183.

Under the NLRA, a claim that the union breached its duty to the employee is "inextricably interdependent" with the claim against the employer under Section 301.

[12] We note here that while decisions of the General Counsel not to pursue a DFR complaint are generally not subject to judicial review, *see Turgeon v. Federal Labor Relations Authority*, 677 F.2d 937 (D.C. Cir. 1982), there may be circumstances under which an employee can seek judicial relief for illegal actions by the general counsel. *Cf. Cutts v. Fowler*, 692 F.2d 138, 140 (D.C. Cir. 1982) (judicial review available to insure compliance with statutory requirement that special counsel perform "adequate inquiry upon which to base its disposition of employee's petition"); *Carducci v. Regan*, 714 F.2d 171, 175 n.4 (D.C. Cir. 1983) (same); *Griffith v. Federal Labor Relations Authority*, 842 F.2d 487, 494 (D.C. Cir. 1988) (judicial review available for constitutional violations).

Delcostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164-65 (1983). The claim against the union is often a "critical issue" in the Section 301 action against the employer and the case the employee must prove is "the same whether he sues one, the other or both. *Id.; Vaca, supra* at 183; *see Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) (union's breach operates to remove bar of finality from arbitration, reviving claim against employer). In the private sector, therefore, it would be inefficient and illogical to bifurcate the consideration of a "hybrid § 301/fair representation claim" by requiring that the union's duty be adjudicated by the NLRB while, or before, the district court considered the claim against the employer.

In the federal sector, the Section 301 half of this hybrid is missing, as this case demonstrates. Karahalios sued both his employer, the Defense Language Institute (DLI), and his union, NFFE. The district court granted DLI's motion for summary judgment, J. A. 81[13], and NFFE was forced to defend the substance of Karahalios' claims against both it and the agency.[14] While the private sector employee always has the option of proceeding

[13] The District Court raised the possibility that the Claims Court would have jurisdiction over an employee's or union's claim that the agency had violated its contract obligations. J.A. 70, 28 U.S.C. §§ 1346(a)(2), 1491. Of course there would be no claim against the union in the Claims Court as the only proper defendant there is the United States.

[14] To establish a breach of the duty of fair representation, the employee must prove both that the underlying agency decision violated the contract and that the union acted in an arbitrary or bad faith manner in processing the grievance. *Clayton v. International Union, United Automobile Workers*, 451 U.S. 679, 683 n.4 (1981); *Vaca, supra*, 386 U.S. at 193. Here NFFE managed to avoid liability for what the district court found to be a breach of its duty by, in effect, rebutting Karahalios' claim against the Agency, that he would have been awarded the position he sought had NFFE taken the case to arbitration. J.A. 95.

against the union alone, *Vaca*, *supra* 386 U.S. at 197, Karahalios would establish this as the only form of district court action, a result that would totally conflict with the "practical considerations" this Court considered so important in *Vaca*. Certainly, if there is one forum where it is practical for these claims to be combined, it is the FLRA and not the district court.

D. Exclusive Representation Does Not Replace "Traditional Forms of Redress" in the Federal Sector

In the private sector, a grant of exclusive representation status to a union deprives individual employees of the right to make and enforce individual contracts with their employers. However, the "unique interests" served by the duty of fair representation, to protect employees who are given a union representative in lieu of their individual "traditional forms of redress," are of considerably less force in the federal sector. *Vaca*, *supra* at 182. In both a theoretical and practical sense, the CSRA rights to organize unions and to file grievances are a supplement to the other rights Congress has granted employees against their federal employer, and do not "strip" employees of preexisting rights.

As a theoretical matter, virtually all employment remedies against the federal government arise from its unilateral consent to be bound; the doctrine of sovereign immunity dictates that the government may only be sued where it has expressly consented. *United States v. King*, 395 U.S. 1, 4 (1969). Thus, federal personnel actions were once viewed as entirely discretionary and not subject to any judicial review. *United States v. Testan*, 424 U.S. 392, 406 (1976). While career federal employees are now protected by a web of statutory and administrative rights and remedies, *see Bush v. Lucus*, 462 U.S. 367, 385-86 (1983), the source of these rights is a statute, not a negotiated agreement between the employer and any employee or group of employees.

When the federal government recognized that the process of collective bargaining would operate in the public interest, 5 U.S.C. § 7101, it granted employees additional rights, but it did not "strip . . . [employees] of traditional forms of redress." *Vaca*, *supra*, 386 U.S. at 182. First, federal employees never had an individual right to negotiate with their employer. Second, many of the terms and conditions of employment which are the traditional province of labor management negotiation, such as wages, fringe benefits, leave, and holidays continue to be set by law and regulation, and are not subject to modification by any individual, union or employing agency. *See* 5 U.S.C. §§ 7103(a)(14)(C), 7117(a). Thus, collective bargaining in the federal government does not involve a significant loss of bargaining power by the individual. Rather, it provides a new avenue for the negotiation of some conditions of employment and, significantly, a new forum for the enforcement of both collective bargaining agreements and all of the laws, rules, and regulations that are not subject to negotiation: the grievance and arbitration procedure. 5 U.S.C. §§ 7103(d)(9), 7121; *see Devine v. White*, 697 F.2d 421, 438 (D.C. Cir. 1983).

Finally, in addition to these differences between the private sector and federal sector, Congress enacted a practical gap in the exclusivity of representation of unions in the federal service. While collectively bargained grievance procedures generally are the exclusive means employees may use to redress employment related complaints, 5 U.S.C. § 7121(a), there are two statutory exceptions to the rule of exclusivity for the most important classes of complaints, disciplinary cases and discrimination cases. 5 U.S.C. § 7121(a), (d), (e); *see Cornelius v. Nutt*, 472 U.S. 648, 652 (1985). For these claims, the employee may use either the statutory appeals process or the negotiated grievance procedure. And, of course, federal employees have employment related rights that arise

under completely independent statutory provisions, which may be pursued outside of the grievance mechanism. *See e.g.* 29 U.S.C. 203(e), 204(f), 216(b) (Fair Labor Standards Act); 5 U.S.C. 552a(g) (Privacy Act). The parallel statutory appeals procedures and the existence of separate causes of action under other statutes insure that employees with the most serious cases have *chosen* to process their complaints through the negotiated grievance and arbitration procedure. Thus, federal employees may in large part avoid the "subordination of individual interests" said to accompany collective bargaining. *Vaca, supra* at 182. It is therefore apparent that this last rationale of *Vaca* like those discussed above, does not support the creation of a private right of action to enforce the federal sector duty of fair representation.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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